IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

33811

No. ~~07-056~~

EVELYN L. "PEACH" MURPHY
Administrator of the Estate of
Andrew John Murphy,

Appellant,

v.

S.W. JACK DRILLING COMPANY;
KENNETH GREATHOUSE, a West Virginia resident;
and RODNEY PAXTON, a West Virginia resident;

Appellees.

RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

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TABLE OF AUTHORITIES

Cases

Statutes

Now comes the Appellee, S.W. Jack Drilling Company ("S.W. Jack"), by counsel, and responds to the Supplemental Brief filed by the Appellant pursuant to this Court's December 19, 2008 Order.

I. INTRODUCTION

One sentence of Judge O'Briant's Order granting summary judgment particularly explains why his decision in this case is correct: "the limited class of beneficiaries in a deliberate intent action is one of the obvious tradeoffs for the Workers' Compensation system that the Legislature has enacted." The cause of action at issue in this case is an *exception* to immunity carefully governed by statute to preserve the balance of the foundational underpinnings of the Workers' Compensation system: no fault recovery by the employee and immunity from civil suit for the employer. When placed in this context, and with the understanding that many states either do not permit any exception to immunity or only grant an exception for specifically intended injuries, the result in this case is neither appalling nor unfounded. West Virginia's law clearly and simply limits recovery for "deliberate intention" to those persons who are eligible to receive Workers' Compensation benefits .

Appellant's Supplemental Brief inexcusably presents "supplemental facts" and arguments never presented to the Circuit Court of Logan County or in any prior briefings in this matter. Notwithstanding this fact, the Supplemental Brief fails to raise any argument of merit, and the lower court's ruling should be affirmed.

II. ARGUMENT

A. Appellant's presentation of "supplemental facts" not presented to the lower court is clearly improper and they should be disregarded.

In the face of clear West Virginia law, the Appellant attempts to submit additional evidence to this Court that was not produced or submit to the lower court for consideration in its ruling on the Motion for Summary Judgment. This Court has specifically addressed this practice and stated:

> Rule 56 does not impose upon the Circuit Court a duty to sift through the records in search of evidence to support a party's opposition to summary judgment. Nor is it our duty to do so on appeal . . . [A]lthough our review of this record from a summary judgment proceeding is *de novo*, this Court for obvious reasons, will not consider **evidence or arguments** that were not presented to the Circuit Court for its consideration and ruling on the Motion. To be clear, **our review is limited to the record as it stood before the Circuit Court at the time of this ruling.**

Powderidge Unit Owners Association v. Highland Properties, Ltd., 196 W.Va. 692, 700, 472 S.E.2d 872, 880 (W.Va. 1996). (Emphasis added). *See also Trent v. Cook*, 198 W.Va. 601, 605, 482 S.E.2d 218, 222 (1996)(Footnote 8; citing *Powderidge*); *Lively v. Rufus*, 207 W.Va. 436, 448, 533 S.E.2d 662, 674 (2000)(Footnote 21; citing *Powderidge*); *Arnold Agency v. West Virginia Lottery Comm'n.*, 206 W.Va. 583, 589, 526 S.E.2d 814, 820 (1999)(Footnote 4; Petitioner attempted to file "numerous deposition transcripts" with the Supreme Court after petition for appeal filed, which evidence was not considered based on *Powderidge et al.*);*West Virginia Dep't of Health and Human Resources v. Doris S.*, 197 W.Va. 489, 494, 475 S.E.2d 865 (1996)(Footnote 6: "it is the parties' duty to make sure that evidence relevant to a judicial determination be placed in the record before the lower court so that we may properly consider it on appeal.").The Plaintiff below and Appellant herein had every

chance to develop and submit evidence opposing the Motion for Summary Judgment. When a non-moving party is faced with a properly supported Motion for Summary Judgment, its obligation is clear:

> If the moving party makes a properly supported Motion for Summary Judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the non-moving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. Syl. Pt. 3 *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329 (1995); *Evans v. Mutual Mining*, 199 W.Va. 526 (1997).

Appellant's "supplemental facts" concerning Ms. Murphy's application for dependency benefits are not part of the lower court record, were never presented to the lower court by affidavit or otherwise, and therefore must be disregarded by this Court. Moreover, the fact that Appellant's counsel was not retained to represent her in a claim for Workers' Compensation benefits is a distinction without a difference. West Virginia Code section 23-4-2 clearly interplays with the workers' compensation system and Ms. Murphy's application for benefits should have involved her counsel. Finally, the issue of Heather Murphy's dependency was *has never been raised* to any court prior to the filing of the Supplemental Brief and has never even been alleged throughout these proceedings.

In short, Appellant's "supplemental facts" have no place in this appeal or this Court's decision. They are an improper emotional plea to avoid the clear application of law.

B. Appellant's Supplemental Brief continues to argue in the face of clear precedent, and Appellant's arguments for why the *Savilla* decision is wrong are without merit.

1. West Virginia Code §23-4-2(c) does not merely provide a "classification of people who may recover administrative remedies under the Workers' Compensation Act" but expressly states who may recover for deliberate intention.

Appellant raises a new argument in the Supplemental Brief to the effect that West Virginia Code section 23-4-2(c)'s provision of a cause of action to the "widow, widower, child or dependent" of the deceased employee "simply states that this is the classification of people who may recover administrative remedies under the Workers' Compensation Act." Supp. Brief at p. 7. Although Appellant's argument is difficult to follow, it appears that Appellant attempts to distinguish the Legislature's specific designation of who possesses a cause of action for deliberate intent from who it meant to recover for the action.

The grant of a cause of action to specific persons obviously contemplates the fact that those persons are the only ones who can recover for that cause of action. Again, *Savilla v. Speedway SuperAmerica, LLC*, 219 W.Va. 758, 639 S.E.2d 850 (2006) already decided this issue just twenty-six months ago and recognized the plain language of West Virginia Code section 23-4-2(c) and the narrower class of beneficiaries designated thereunder. Appellant's argument is unfounded, against clear precedent, and improperly made at the appellate level as it was not raised below.

2. The *Savilla* court properly omitted the word "employee" in discerning who may recover in a wrongful death deliberate intent action.

Appellant again raises the argument that the *Savilla* decision was incorrectly decided because this Court omitted the word "employee" in the third syllabus point. The omission of the word

"employee" from this syllabus point is correct based on the fact that in the case of death it is the widow, widower, child or dependent that recovers, while in the case of injury the employee recovers. The language of the statute is clear, and this Court applied it as such in *Savilla*.

The only additional aspect to this argument raised by Appellant is a citation to *Roney v. Gencorp*, 431 F.Supp.2d 622 (S.D.W.Va. 2006). The citation to this case is apparently made because it quotes the "as if this Chapter had not been enacted" language of the statute. However, it does not advance the argument of the Appellant in any fashion. To the extent that the *Roney* decision suggests that an "employee" can bring a cause of action for wrongful death, the opinion is inconsistent with the plain language of the statute and this Court's later holding in *Savilla* (*Roney* was decided May 9, 2006, while *Savilla* was decided on November 16, 2006).

3. Appellant's argument that the *Savilla* decision improperly interprets the phrase "as if this Chapter had not been enacted" is without merit.

Again, Appellant cites to the phrase "as if this Chapter had not been enacted" in section 23-4-2(c) to argue that *Savilla* was wrongly decided and that this phrase unambiguously means that an "employee" can bring a claim for wrongful death.

This argument ignores the clear language of the statute that a cause of action is afforded to the employee in the case of injury, or to the widow, widower child or dependent in the case of death. The language "as if this Chapter had not been enacted" cannot and does not change this fact. The phrase is merely an acknowledgment of the fact that in granting a cause of action over and above the recovery of workers' compensation benefits the statutory immunity an employer would otherwise have is lost.

C. Clear statutory language prevents collateral attack on the administrative determination that Ms. Murphy is not a "dependent."

The final argument raised in the Supplemental Brief adds nothing new to the prior arguments raised. Again, as stated in the Appellee's first brief, the test for whether quasi-judicial preclusion is appropriate is applicable only when "there is no statutory authority directing otherwise." *State v. Miller*, 194 W.Va. 3, 11-12, 459 S.E.2d 114, 122-123 (1995). In this case, there is clear statutory language directing that the matter is finally decided and that a timely appeal is a condition of the right to litigate and hence jurisdictional.

III. CONCLUSION

WHEREFORE, for the reasons stated above, and stated in Appellee's initial briefing to this Court, S.W. Jack Drilling Company respectfully requests that this Court affirm the decision of the Circuit Court of Logan County.

S. W. JACK DRILLING CO.,
By Counsel

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CERTIFICATE OF SERVICE

I, Thomas V. Flaherty, counsel for Appellee, S.W. Jack Drilling Company, do hereby certify that the "Response to Appellant's Supplemental Brief" was served upon the following counsel of record by placing true and accurate copies thereof in the United States Mail, first class, postage prepaid, this 22d day of January, 2009:

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